

ESTTA Tracking number: **ESTTA287648**Filing date: **06/03/2009**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**Notice of Opposition**

Notice is hereby given that the following parties oppose registration of the indicated application.

**Opposers Information**

Name	Frito-Lay North America, Inc.
Granted to Date of previous extension	06/03/2009
Address	7701 Legacy Drive Plano, TX 75024 UNITED STATES

Name	Smartfoods, Inc.		
Entity	Corporation	Citizenship	Delaware
Address	7701 Legacy Drive Plano, TX 75024 UNITED STATES		

Attorney information	Jeanette S. Zimmer 7701 Legacy Drive, Mail Stop 3A-421 Plano, TX 75024 UNITED STATES trademarks@fritolay.com, jeanette.zimmer@fritolay.com, catherine.barry@fritolay.com
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**Applicant Information**

Application No	77565214	Publication date	02/03/2009
Opposition Filing Date	06/03/2009	Opposition Period Ends	06/03/2009
Applicant	Katzin, David Brandeis No. 302 10102 Emphyrean Way Los Angeles, CA 90067 UNITED STATES		

**Goods/Services Affected by Opposition**

Class 005.

All goods and services in the class are opposed, namely: Baby food; Dietary and nutritional supplements; Dietary and nutritionally fortified food products adapted for medical use; Dietary beverage supplements for human consumption in liquid and dry mix form for therapeutic purposes; Dietary fiber as an additive for food products; Dietary food supplements; Dietary supplemental drinks; Dietary supplements; Dietary supplements for human consumption; Dietary supplements for pets; Dietetic foods adapted for medical use; Food for babies; Food for diabetics; Food supplements; Food supplements, namely, anti-oxidants; Ground flaxseed fiber for use as a dietary supplement; Herbal supplements; Liquid nutritional supplement; Meal replacement and dietary supplement drink mixes; Mineral food supplements; Mineral nutritional supplements; Mineral supplements; Natural supplements for treating erectile dysfunction; Nutraceuticals for use as a dietary supplement;

Nutritional additives for medical purposes for use in foods and dietary supplements for human consumption; Nutritional supplement in the nature of a nutrient-dense, protein-based drink mix; Nutritional supplements; Powdered nutritional supplement drink mix; Protein supplements; Vitamin and mineral preparations for use as ingredients in the food and pharmaceutical industry; Vitamin and mineral supplements; Vitamin supplement in tablet form for use in making an effervescent beverage when added to water; Vitamin supplements; Vitamins and dietary food supplements for animals

## Grounds for Opposition


Deceptiveness	Trademark Act section 2(a)
False suggestion of a connection	Trademark Act section 2(a)
Priority and likelihood of confusion	Trademark Act section 2(d)
Dilution	Trademark Act section 43(c)
Other	Trademark Act Section 43(a)


## Marks Cited by Opposer as Basis for Opposition

U.S. Registration No.	1367966	Application Date	04/25/1985
Registration Date	10/29/1985	Foreign Priority Date	NONE
Word Mark	SMARTFOOD		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 030. First use: First Use: 1985/03/01 First Use In Commerce: 1985/03/25 POPPED POPCORN		

U.S. Application No.	78454783	Application Date	07/22/2004
Registration Date	NONE	Foreign Priority Date	NONE
Word Mark	SMARTFOOD		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 029. First use: POTATO-BASED SNACK FOODS; SOY-BASED SNACK FOODS EXCLUDING BREAKFAST CEREALS AND CEREAL BARS; EDIBLE PROCESSED FLAXSEED; VEGETABLE-BASED SNACK FOODS; PROCESSED NUTS; PROCESSED LEGUMES Class 030. First use:		

	PRETZELS; TORTILLA CHIPS; CHEESE FLAVORED SNACKS, NAMELY CHEESE PUFFS; EXTRUDED CORN SNACKS; WHEAT-BASED SNACK FOODS, PROCESSED OATS, PUFFED RICE SNACKS, MULTIGRAIN SNACK CHIPS, ALL OF THE AFOREMENTIONED TO EXCLUDE BREAKFAST CEREALS AND CEREAL BARS
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U.S. Application No.	77552385	Application Date	08/21/2008
Registration Date	NONE	Foreign Priority Date	NONE
Word Mark	SMARTFOOD		
Design Mark			
Description of Mark	NONE		
Goods/Services	<p>Class 029. First use:            Potato based snack foods; fruit and soy based snack foods; fruit-based snack foods; nut-based snack foods, namely, nut crisps; nut-based snack foods, namely, nut clusters; candy coated nuts; vegetable-based snack foods; processed edible seeds; snack mixes consisting primarily of processed fruits, processed nuts and/or raisins; snack mixes consisting primarily of dehydrated fruit and processed nuts</p> <p>Class 030. First use:            Cereal-based snack foods; corn-based snack foods; grain-based snack foods; rice-based snack foods; wheat-based snack foods; crackers; snack mixes consisting primarily of crackers, pretzels, candied nuts and/or popped popcorn; candy coated popcorn; glazed popcorn; chocolates and chocolate based ready to eat candies and snacks; candy</p>		

U.S. Application No.	77636232	Application Date	12/18/2008
Registration Date	NONE	Foreign Priority Date	NONE
Word Mark	SMARTFOOD		
Design Mark			
Description of Mark	The mark consists of the stylized word "SMARTFOOD" with a fanciful leaf design at the end.		

Goods/Services	Class 030. First use: Popcorn; Popcorn Clusters
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Attachments	78454783#TMSN.jpeg ( 1 page )( bytes ) 77552385#TMSN.jpeg ( 1 page )( bytes ) 77636232#TMSN.jpeg ( 1 page )( bytes ) SMARTFOODS TECHNOLOGY opposition.pdf ( 7 pages )(242415 bytes )
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### Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Signature	/Jeanette S. Zimmer/
Name	Jeanette S. Zimmer
Date	06/03/2009

IN THE UNITED STATES PATENT & TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL & APPEAL BOARD

In the matter of Application Serial No. 77565214  
For the mark SMARTFOODS TECHNOLOGY  
Published in the *Official Gazette* on February 3, 2009

FRITO-LAY NORTH AMERICA, INC. and	)	
SMARTFOODS, INC.	)	
Opposers	)	
	)	
v.	)	Opposition No. _____
	)	
DAVID BRANDEIS KATZIN	)	
Applicant	)	

**NOTICE OF OPPOSITION**

Opposers, Frito-Lay North America, Inc. and Smartfoods, Inc. (collectively referred to as "Opposers"), both Delaware corporations having a place of business at 7701 Legacy Drive, Plano, Texas 75024, believe they will be damaged by the issuance of a registration to David Brandeis Katzin ("Applicant"), an individual with an address at No. 302, 10102 Empyrean Way, Los Angeles, California 90067, upon its Application Serial No. 77565214 for the mark SMARTFOODS TECHNOLOGY in International Class 5, filed on September 9, 2008, and based on an intent-to-use the mark (the "Application").

The United States Patent & Trademark Office previously granted extensions to oppose the Application. Smartfoods, Inc. is a party in privity with Frito-Lay North America, Inc. since, among other things, Frito-Lay North America, Inc. is the ultimate parent company of Smartfoods, Inc. and the SMARTFOOD brand of popcorn products constitutes one of the many snacks in the Frito-Lay family of snack products.

Opposers hereby oppose the Application on the following grounds:

1. Opposers through its predecessors in interest and title, and through its related companies, divisions and/or licensees (collectively referred to as "Opposers"), have been engaged in the manufacture and sale of snack foods for over fifty years and is one of the largest manufacturers of snack foods in the United States.

2. Opposers' snack foods are marketed and sold in tremendous quantities on a nationwide basis, supported by tens of millions of dollars of advertising and promotion each year. Opposers' products are sold in almost every supermarket in the United States as well as in numerous convenience stores, vending machines, mass merchandise stores, schools and other outlets.

3. Opposers own and/or are authorized to use the trademark rights in the SMARTFOOD mark, including U.S. Registration No. 1,367,966 for the mark SMARTFOOD, registered on October 29, 1985 for use on "popped popcorn" in International Class 30 (the "Registration"). The Registration is incontestable, serves as *prima facie* evidence of the validity of the registered mark, of the exclusive right to use the registered mark in commerce and serves as constructive notice of ownership of the mark and registration.

4. Opposers own and/or are authorized to use the trademark rights in the SMARTFOOD mark, including U.S. Application Serial No. 78454783 for the mark SMARTFOOD, filed July 22, 2004 for use on "potato-based snack foods; soy-based snack foods excluding breakfast cereals and cereal bars; edible processed flaxseed; vegetable-based snack foods; processed nuts; processed legumes" in International Class 29 and "pretzels; tortilla chips; cheese flavored snacks, namely cheese puffs; extruded corn snacks; wheat-based snack foods, processed oats, puffed rice snacks, multigrain snack chips, all of the aforementioned to exclude breakfast cereals and cereal bars" in International Class 30.

5. Opposers own and/or are authorized to use the trademark rights in the SMARTFOOD mark, including U.S. Application Serial No. 77552385 for the mark

SMARTFOOD, filed August 21, 2008, for use on “potato based snack foods; fruit and soy based snack foods; fruit-based snack foods; nut-based snack foods, namely, nut crisps; nut-based snack foods, namely, nut clusters; candy coated nuts; vegetable-based snack foods; processed edible seeds; snack mixes consisting primarily of processed fruits, processed nuts and/or raisins; snack mixes consisting primarily of dehydrated fruit and processed nuts” in International Class 29 and “cereal-based snack foods; corn-based snack foods; grain-based snack foods; rice-based snack foods; wheat-based snack foods; crackers; snack mixes consisting primarily of crackers, pretzels, candied nuts and/or popped popcorn; candy coated popcorn; glazed popcorn; chocolates and chocolate based ready to eat candies and snacks; candy” in International Class 30.

6. Opposers own and/or are authorized to use the trademark rights in the SMARTFOOD mark, including U.S. Application Serial No. 77636232 for the mark SMARTFOOD & Design, filed December 18, 2008, for use on “popcorn; popcorn clusters” in International Class 30.

7. Opposers have used the SMARTFOOD mark on and in connection with snack foods and related products, including popped popcorn, since at least as early as March, 1985.

8. Since a date long prior to the filing date of the Application and continuing through the present, the SMARTFOOD mark has been identified with Opposers and appears on product packaging, advertising, in-store display racks, trucks, signage, point-of purchase material, etc.

9. Opposers have, by virtue of incredibly extensive usage, advertising and promotion, built up a very high level of consumer and trade recognition symbolized by the SMARTFOOD mark. Due to extensive public exposure to, and awareness by, consumers and the trade, the SMARTFOOD mark is famous and have acquired, and now possess, an extremely favorable reputation and distinctiveness with an invaluable amount of goodwill, solely signifying Opposers as the source of food products of high quality.

10. On information and belief, on September 9, 2008, Applicant filed Application Serial No. 77565214 to register SMARTFOODS TECHNOLOGY on an intent-to-use basis for goods in International Classes 5 and 29. The application was later amended to delete all goods in Class 29. The application as published includes the following goods in Class 5: “Baby food; Dietary and nutritional supplements; Dietary and nutritionally fortified food products adapted for medical use; Dietary beverage supplements for human consumption in liquid and dry mix form for therapeutic purposes; Dietary fiber as an additive for food products; Dietary food supplements; Dietary supplemental drinks; Dietary supplements; Dietary supplements for human consumption; Dietary supplements for pets; Dietetic foods adapted for medical use; Food for babies; Food for diabetics; Food supplements; Food supplements, namely, anti-oxidants; Ground flaxseed fiber for use as a dietary supplement; Herbal supplements; Liquid nutritional supplement; Meal replacement and dietary supplement drink mixes; Mineral food supplements; Mineral nutritional supplements; Mineral supplements; Natural supplements for treating erectile dysfunction; Nutraceuticals for use as a dietary supplement; Nutritional additives for medical purposes for use in foods and dietary supplements for human consumption; Nutritional supplement in the nature of a nutrient-dense, protein-based drink mix; Nutritional supplements; Powdered nutritional supplement drink mix; Protein supplements; Vitamin and mineral preparations for use as ingredients in the food and pharmaceutical industry; Vitamin and mineral supplements; Vitamin supplement in tablet form for use in making an effervescent beverage when added to water; Vitamin supplements; Vitamins and dietary food supplements for animals.”

11. Opposers have priority over Applicant because its trademark registration date, application filing dates, and use dates precede the Applicant's filing date for its intent-to-use application or on information and belief, any claimed use of the SMARTFOODS TECHNOLOGY mark.



12. On information and belief, the food products on which Applicant's mark will be used and the food products upon which the Opposers' marks are extensively used and registered are or are likely to be similar, competitive, related or complementary products. On information and belief, the food products appeal or will appeal to the same class of purchasers, can be consumed together, and/or are goods of a type which are often sold through the same channels of trade and/or are purchased on impulse.

13. Particularly in view of Applicant's disclaimer of the word TECHNOLOGY, the SMARTFOODS TECHNOLOGY mark is virtually identical and confusingly similar to Opposers' SMARTFOOD mark.

14. Registration of the Application, which is the subject of this opposition, is barred by the provisions of Section 2(d) of the Trademark Act of 1946, 15 U.S.C. § 1052(d) because said mark consists of or comprises a mark which so resembles a mark previously used and registered in the United States by Opposers, and not abandoned, as to be likely, when used in connection with the claimed goods of the Applicant to cause confusion, mistake or deception as to the source of Applicant's goods within the meaning of 15 U.S.C. §§1052(d), 1063, 1114.

15. Applicant's claimed SMARTFOODS TECHNOLOGY Mark and Opposers' SMARTFOOD mark are similar in sight, sound, meaning and overall commercial impression. These similarities are enhanced in view of prior use and registration of Opposers' marks such that, on information and belief, consumers are likely to perceive Applicant's mark as a similar or related play off of Opposers' SMARTFOOD mark.

16. Applicant's SMARTFOODS TECHNOLOGY mark which is the subject of this opposition, so resembles Opposers' previously used and registered SMARTFOOD mark, as to be likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection or association of Applicant with Opposers or to constitute a false representation that Applicant's goods are approved or sponsored by

Opposers or that Applicant's business is connected with or affiliated with Opposers, thereby deceiving the public, causing confusion or mistake and causing damage to Opposers within the meaning of 15 U.S.C. §1125(a).

17. The SMARTFOOD mark is inherently distinctive and became famous long prior to the filing date of Applicant's application-in-opposition and/or any claimed date of first use by Applicant of the SMARTFOODS TECHNOLOGY Mark which is the subject of the Application. Registration and use of Applicant's mark would likely dilute the distinctiveness of the famous and highly distinctive SMARTFOOD mark in violation of 15 U.S.C. § 1125(c). Accordingly, Applicant's mark is not entitled to registration and will damage Opposers' rights under 15 U.S.C. §§ 1052(f), 1063 and 1125(c).

18. Opposers will be damaged by the registration sought by Applicant within the meaning of 15 U.S.C. §1063 because such a registration would support and assist Applicant in the confusing, misleading and/or dilutive use of the SMARTFOODS TECHNOLOGY mark, and would give color of exclusive statutory rights to Applicant in violation and derogation of the prior and superior rights of Opposers.

19. In view of the foregoing, issuance of a registration to Applicant for its claimed SMARTFOODS TECHNOLOGY mark, which is the subject of the Application would, therefore, be damaging to Opposers' common law rights and federal registration within the meaning of the Lanham Act, 15 U.S.C. §§ 1052, 1063, 1114, 1125.

[INTENTIONALLY LEFT BLANK]

WHEREFORE, Opposers pray that this opposition be sustained and that registration be denied to Applicant on its Application Serial No. 77565214.

Respectfully submitted,

FRITO-LAY NORTH AMERICA, INC.  
SMARTFOODS, INC.

Date: June 3, 2009

By:

  
Jeanette S. Zimmer

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Attorney for Opposers

**CERTIFICATE OF SERVICE**

I hereby certify that this Notice of Opposition is being deposited with the United States Postal Service with sufficient postage as First Class Mail in an envelope addressed to the Correspondent on record for Applicant:

David Brandeis Katzin  
DBKMD LTD  
10102 Empyrean Way  
No. 302  
Los Angeles, California 90067

  
Jeanette S. Zimmer